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FGA, Inc. v. Giglio, 128 Nev. Adv. Op. 26 (June 14, 2012)¹
TORTS – NEGLIGENCE - PREMISES LIABILITY
CIVIL PROCEDURE – GENERAL VERDICT RULE
EVIDENCE – EXCLUSION OF EVIDENCE

Summary

The Court considered whether the “mode of operation” approach to premises liability, under which the plaintiff does not have to prove defendant’s knowledge of a particular hazardous condition if the plaintiff can prove that the nature of the defendant’s business tends to create a substantial risk of the type of harm the plaintiff suffered, extends beyond the self-service context to sit-down restaurants, and whether the district court abused its discretion in excluding certain evidence.

Disposition/Outcome

Because the mode of operation approach is premised on the idea that business owners should be held responsible for the risks that their choice to have customers serve themselves creates, the Court concluded that the “mode of operation” approach to premises liability does not apply to “sit-down” restaurants.

Factual and Procedural History

Respondent Debbie Giglio was on a date with Raymond Schefrel at Carmine’s Little Italy (“Carmine’s”), a “sit-down” restaurant. Carmine’s was operated by appellant FGA, Inc., which was owned by appellants Carmine and Ann M. Vento Revocable Trust. The Trust was FGA’s landlord.

Giglio and Schefrel consumed four beers and two glasses of wine at Carmine’s before Giglio fell on her way to the restroom. Giglio claimed to have slipped on a greasy or oily substance. Schefrel did not see the fall, but corroborated that there was an oily substance on the floor. Managers for Carmine’s stated that the floor was clean and Giglio fell without slipping. Carmine’s surveillance cameras were inoperable the night in question.

After the fall, Giglio had various medical procedures performed on her back and neck, and claimed future medical treatment would be needed in the future. Giglio filed suit against FGA, Inc. and the Trust (collectively “FGA”), alleging negligence.

Before trial, the general manager of Carmine’s incorrectly testified at a PMK deposition that FGA held a “nonrestricted” gaming license. At trial, the district court took notice of Nevada Gaming Regulation 5.160, which requires entities with nonrestricted gaming licenses to maintain video surveillance. However, the district court did not allow FGA to present evidence that FGA in fact held a “restricted” gaming license.

¹ By Brandon C. Sendall.

Giglio filed a motion in limine to exclude evidence of her prior and subsequent accidents and injuries because they were not causally related to the injuries sustained in the accident, which the district court granted. The district court also granted Giglio's motion in limine to exclude evidence of her alcohol consumption on the night of the fall.

At close of Giglio's evidence, FGA moved for judgment as a matter of law under NRCPC 50(a), on the basis that the Trust, as mere landlord, could not be liable for the negligence of its tenant. The motion was denied. The jury was subsequently instructed that FGA was negligent if FGA or one of its employees (1) caused a foreign substance to be in the floor, (2) had actual or constructive notice of the substance and failed to remedy, or (3) that notice was established from a foreseeable condition based on the nature of the owner's business, or mode of operation, such as self-service, under the "mode of operation" approach to premises liability.² The mode of operation instruction was given over FGA's objection. The jury found FGA 51 percent negligent; however no interrogatories were given to the jury to indicate which theory of negligence it based its determination on. FGA appealed.

Discussion

On appeal, FGA argued that (1) the district court abused its discretion by giving a mode of operation instruction in a case involving a sit-down restaurant; (2) the district court abused its discretion by excluding evidence of Giglio's preexisting injuries, evidence of alcohol consumption, and evidence to clarify the applicability of a gaming regulation; and (3) the district court erred by denying the motion for judgment as a matter of law.

Mode of Operation Jury Instruction

A. General Verdict Rule

As a preliminary matter, the Court first determined that FGA's mode of operation argument on appeal was not rendered moot by the general verdict rule. The general verdict rule provides that if a jury renders a general verdict for one party, and no party requests interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party."³

In this case, the Court adopted the reasoning of the Connecticut courts and held that the general verdict rule is inapplicable in cases where overlapping factual theories support a single theory of recovery. Therefore, although Giglio alleged alternate factual theories of negligent conduct, she raised only one theory of recovery—negligence. The general verdict rule does not apply in situations where a jury renders a verdict on a single negligence claim that is premised on multiple factual theories, therefore FGA's mode of operation argument was not moot on appeal.

² See *Sheehan v. Roche Bros. Supermarkets, Inc.*, 863 N.E.2d 1276, 1283 (Mass. 2007)

³ *Curry v. Burns*, 626 A.2d 719, 721 (Conn. 1993). See *Skender v. Brunsonbuilt Construction & Development Co.*, 122 Nev. 1430, 1438, 148 P.3d 710, 716 (2006).

B. Applicability of a “Mode of Operation” Instruction

FGA argued on appeal that the district court abused its discretion by instructing the jury on mode of operation liability because mode of operation liability only applies in the context of self-service operations. The Court reviewed the jury instruction for an abuse of discretion or judicial error.⁵

Traditionally, where a substance causing a slip and fall results from “the actions of persons other than the business or its employees, the business will only be liable if it had actual or constructive notice of the condition and failed to remedy it.”⁶ However, there is a modern trend toward modifying this traditional approach to premises liability to accommodate newer merchandising techniques, such as the shift from clerk-assisted to self-service operations.⁷ Under the mode of operation approach, if a customer who is performing a task traditionally performed by employees negligently creates a hazardous condition, the owner is charged with creating this condition just as the owner would be charged with the responsibility for negligent acts of his employees because it was the owner’s choice of mode of operation that created the risk.⁸

The Supreme Court of Nevada implicitly adopted the mode of operation approach in *Sprague*, when it stated that even in the absence of constructive notice, a jury could conclude that a grocery store should have recognized the impossibility of keeping the produce section clean by sweeping alone.⁹ However, *Sprague* dealt with a self-service section in a supermarket; therefore, the Court did not address whether it would extend beyond self-service operations.

In this case, the Court held that mode of operation liability does not generally extend beyond self-service operations to sit-down restaurants. Therefore, the Court held that the district court abused its discretion by giving a mode of operation jury instruction in the context of a sit-down restaurant.

District Court Evidentiary Rulings

FGA argued that the district court erred by excluding evidence of Giglio’s preexisting injuries, evidence of Giglio’s alcohol consumption, and the potential applicability of gaming regulations to FGA. The Court reviewed the district court’s evidentiary rulings for an abuse of discretion.¹⁰

A. Preexisting Back Condition

FGA argued that the district court abused its discretion in excluding evidence of Giglio’s preexisting back condition. A preexisting injury may be relevant to the issues of causation and

⁵ *Skender*, at 1435, 714.

⁶ *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-23 (1993).

⁷ *Sheehan*, at 1281-82.

⁸ *Ciminski v. Finn Corporation, Inc.*, 537 P.2d 850, 853 (Wash. Ct. App. 1975).

⁹ *Sprague*, at 251, 323.

¹⁰ *M.C. Multi-Family Dev. v. Crestdale Assocs.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008).

damages in a personal injury action.¹¹ However, in order for evidence of a preexisting injury to be admissible, a defendant must present by competent evidence a causal connection between the prior injury and the injury at issue.¹² Further, unless it is readily apparent to a layperson, the defendant must generally produce expert testimony demonstrating the relationship between the prior injury and the injury complained of, and why it is relevant to a fact of consequence.¹³

In this case, none of FGA's experts were able to testify to a reasonable degree of medical probability that her preexisting condition caused the injuries at issue. Therefore, the district court did not abuse its discretion in excluding the evidence of Giglio's preexisting back condition because FGA's expert testimony failed to meet the appropriate causation standard.

B. Alcohol Consumption

FGA argued that the district court erred by excluding evidence that Giglio and Schrefel consumed alcohol prior to Giglio's fall. Evidence of a party's intoxication may be probative of the issues of comparative negligence and causation.¹⁴ However, evidence of intoxication should not be admitted if there is no causal link between the alleged intoxication and the injury.¹⁵

In this case, while there is conflicting testimony as to how many drinks Giglio consumed prior to the fall, there is no evidence that Giglio showed signs of intoxication in the accident report or medical records. Because there was insufficient evidence to show Giglio was intoxicated at the time of the slip and fall, the district court did not abuse its discretion in excluding evidence of Giglio's alcohol consumption.

However, the Court determined that the district court abused its discretion in excluding evidence that Giglio's key witness, Schrefel, consumed alcohol. Evidence of Schrefel's alcohol consumption was relevant to his ability to perceive the presence foreign substance on the floor and should be admitted to assist the jury in determining Shrefel's reliability as an eyewitness.

C. Nevada Gaming Regulation 5.160

FGA argued that the district court erred by taking judicial notice of Nevada Gaming Regulation 5.160, which requires those establishments with a nonrestricted gaming license to have operational surveillance cameras. FGA further argued that the district court abused its discretion by permitting Giglio to present evidence of the regulation while not permitting FGA to present rebuttal evidence that the regulation did not apply to it because it only held a restricted gaming license.

The general manager of Carmine's incorrectly testified at a PMK deposition that FGA held a "nonrestricted" gaming license. If true, this would have implicated FGA under Nevada

¹¹ *Voykin v. Estate of DeBoer*, 733 N.E.2d 1275, 1279-80 (Ill. 2000).

¹² *See McCormack v. Andres*, 185 P.3d 973, 977 (Mont. 2008)

¹³ *Voykin*, 733 N.E.2d at 1280.

¹⁴ *See VanHercke v. Eastvold*, 405 N.W.2d 902, 906 (Minn. App. 1987).

¹⁵ *Holderer v. Aetna Cas. and Sur. Co.*, 114 Nev. 845, 852-53, 963 P.2d 459, 464 (1998).

Gaming Regulation 5.160 which requires nonrestricted gaming licensees to maintain operable video surveillance.

Generally, the nature and extent that a party may present evidence to correct or change testimony rests largely in the discretion of the district court.¹⁶ However, the Court stressed that the legal system has an interest in seeking the truth and encourages the correction of erroneous statements by a witness.¹⁷

At trial, FGA informed the court that the manager's testimony was incorrect, and offered both the testimony of the attorney who represented FGA before the Gaming Control Board and a fax from the Gaming Control Board indicating that the license in question was a "restricted" gaming license. The district court excluded this evidence and only allowed the testimony of one of the holders of the license that the license was a restricted license. The court then permitted Giglio to argue that FGA's witnesses lacked credibility because they contradicted the manager's testimony and that there was no way to know what type of license FGA possesses because it was never produced. The Court concluded that the district court abused its discretion in excluding FGA's evidence indicating that it, in fact, had a restricted license.¹⁸

Denial of the Motion for Judgment as a Matter of Law for appellant Carmine Vento and Ann M. Vento Revocable Family Trust

FGA argued that the district court erred in denying its motion for judgment as a matter of law as to the Trust because the Trust, as a mere landlord, could not be held liable for physical harm caused by a dangerous condition on the premises. The Court reviewed of the denial of the motion for judgment as a matter of law de novo.¹⁹

Under Nevada law, a landlord is not liable for injury caused by the negligent actions of its tenant.²⁰ However, a landlord is still subject to the standard duty to exercise reasonable care not to subject others to an unreasonable risk of harm.²¹ The Court determined that the Trust, like the landlord in *Wright*, was potentially liable for its own actions, but not liable solely based on its status as a landlord.

In denying FGA's motion for a judgment as a matter of law, the district court stated that it was the jury's "decision to make a determination as to whether or not the way [Carmine's] was set up from the mode of operation standpoint resulted in a potentially hazardous condition that the property owner and the business owner or the FGA is responsible for." However, because the Court held that the mode of operation approach does not apply in the sit-down restaurant context, the basis for the district court's ruling was no longer valid. Therefore, the Court vacated the district court's order denying judgment as a matter of law and remanded to the district court

¹⁶ See *Turtenwald v. Aetna Casualty & Surety Co.*, 201 N.W.2d 1, 8 (Wis. 1972).

¹⁷ See *Ex parte Keizo Shibata*, 35 F.2d 636, 637-38 (9th Cir. 1929).

¹⁸ See NEV. REV. STAT. § 48.025 (2007).

¹⁹ *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424-25 (2007).

²⁰ *Wright v. Schum*, 105 Nev. 611, 612-13, 781 P.2d 1142, 1142-43 (1989).

²¹ *Id.* at 614, 1143.

for a determination whether Giglio presented sufficient evidence for the jury to find the Trust liable based on its own conduct.

Conclusion

The Court concluded that the district court abused its discretion by giving a mode of operation jury instruction in the context of a sit-down restaurant. The Court further concluded that the district court abused its discretion by excluding evidence of a witness' alcohol consumption prior to a slip and fall and that the district court abused its discretion in excluding evidence to rectify incorrect deposition testimony. Reversed and remanded.